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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, George A. Angle, d/b/a Kansas Refined Helium Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 10, 1971.

OPINION BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto, and was reported at 445 F.2d 237 (D.C. Cir. 1971). The Opinons rendered by the National Labor Relations Board, which were consolidated on appeal, appear in the Appendix hereto, and were reported as follows: *George A. Angle, d/b/a Kansas Refined Helium Company,* 176 NLRB No. 115 and 176 NLRB No. 116 (June 25, 1969).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 10, 1971, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

When an employer has shown a grant of supervisory authority by uncontradicted documentary proof, must he assume the further burden of showing tangible examples of the exercise of such authority in order to prove that such supervisory authority actually exists?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§152. Definitions

When used in this subchapter: . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of

a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

Kansas Refined Helium Company[1] (hereinafter referred to as "Employer") located at Otis, Kansas, is the largest privately owned plant in the United States engaged in the extraction and distribution of liquid helium. Construction of the plant was completed in the spring of 1966 and the Employer took over operation at that time.

The plant was staffed by "operating" employees and "maintenance" employees. Maintenance employees and top Company management (consisting of the plant manager, the operations and engineering manager, and the chief of maintenance), normally worked only during the day shift, Monday through Friday. Since the facility is in continuous operation, operating personnel were on hand 24 hours a day, seven days a week. Each shift of operating personnel was under the control of a "senior operator" who directed two or three "junior operators." Such senior operator was the top management official in charge of the plant and operating personnel during the second and third shifts and all day Saturday and Sunday.

Shortly after the Employer took over operation of the newly constructed plant, two of the four senior operators were instrumental in a drive to unionize the employees. Much of the solicitation was accomplished while the senior operators were the only management representatives on duty directing the junior operators under their control. The efforts of the senior operators and interested employees resulted in signed union authorization cards being obtained from a majority of the employees involved. On July 1, 1966,

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1. At the time of the incidents involved herein, the Company was a sole proprietorship owned and operated by George A. Angle. It was incorporated in September of 1971, and its proper name is now Kansas Refined Helium Corporation.

the Employer received a request for recognition from the Oil, Chemical and Atomic Workers Union (hereinafter referred to as the "Union") and a representation petition which had been filed with the National Labor Relations Board (hereinafter referred to as the "Board").

On August 25, 1966, the Regional Director of the Board held a representation hearing and later ruled that senior operators were supervisors.[2] Shortly thereafter, following the Employer's receipt on or about September 1, 1966, of the third in a series of anonymous letters, the Employer interviewed all personnel at the plant and discharged the two senior operators who had helped the Union drive, together with four employees.

Following such discharge, the Union filed unfair labor practice charges against the Employer. The Regional Director then reversed his position on the supervisory status of the senior operators, issued a Complaint, and filed a request for injunction in the United States District Court for the District of Kansas pursuant to Section 10(j) of the Act.

On April 5, 1967, the District Court issued the requested temporary injunction. (*Sacks* v. *Angle*, U.S. District Court for Kansas, Case No. W-3766, 65 LRRM 2098). This injunctive order was appealed by the Employer to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit modified the order to exclude senior operators from the protection of the order, since they had

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2. The Regional Director's opinion, which was issued in Case No. 17-RC-5126, appears in the Appendix hereto. The Regional Director's decision concerning senior operators was appealed by the Union to the N.L.R.B., which resulted in a ruling that the status of the senior operators would be unanswered unless the results of the election required a decision concerning their eligibility to vote.

previously been held to be supervisors by the Regional Director of the National Labor Relations Board. (*Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967)).

Thereafter, various hearings were held before the National Labor Relations Board which culminated in findings that the Employer had violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. (*George A. Angle d/b/a Kansas Refined Helium Company*, 176 NLRB No. 115; 176 NLRB No. 116, June 25, 1969).

Knowing that the Tenth Circuit had already made a preliminary finding in the 10(j) case upholding the supervisory status of the senior operators, the Union filed a Petition for Review with the Circuit Court of Appeals for the District of Columbia.[3] The Employer objected to this change of Circuits, but the Union won its race from the Tenth Circuit to the District of Columbia Circuit because it had filed the second phase of the case in Washington before the Employer filed in Denver.

The District of Columbia Circuit then heard the case and ordered enforcement of the Board order.

In rendering its decision, the Court stated:

> "[T]he single substantive issue meriting extended exposition is the 'aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor.' That inquiry here focuses on the status of the plant's 'senior operators.'" (*Oil, Chemical and Atomic Workers Union (OCAW)* v. *NLRB*, 445 F.2d 237, 240 (D.C. Cir. 1971)).

The facts revealed that the senior operators are the only managerial personnel present for many hours each day and week and that they earned 80 to 85 cents more

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3. The Court of Appeals below had jurisdiction pursuant to §10(f) of the Act, 29 U.S.C. §160(f).

per hour than their subordinates. The evidence before the Court also showed that the Employer had posted notices and directives in the plant long before the Union effort began. These notices showed that senior operators were to be "responsible" for their shift; that they were to "supervise the personnel on [their] shift"; that a particular individual had been "promoted" to senior operator to "run the fourth shift"; that "each supervisor will approve employees' time cards . . . senior operators will approve employees under their supervision"; that each senior operator "shall follow up these instructions and see that the employees take care of [particular tasks]"; and gave senior operators "authority to call out instrument men when needed." Notwithstanding these notices were posted long before the advent of the Union, the Circuit Court agreed with the Board that they were nothing more than "naked designations" of "paper power."[4] The Court then stated:

> "We agree that, beyond the statements or directives themselves, what the statute requires is evidence of actual suprvisory authority visibly translated into tangible examples demonstrating the existence of such authority." (*OCAW* v. *NLRB, supra* at 243).

Since the Court found no such tangible examples of the exercise of supervisory authority, it held that the discharged individuals were all employees protected by the Act.

REASONS FOR GRANTING THE WRIT

1. The decision below is in error and conflicts with the decisions of other Courts of Appeals as to the proper

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4. Detailed facts appear in the various decisions in the Appendix.

interpretation of the statutory definition of a "supervisor," under 29 U.S.C. §152(11).

2. The conflicting Circuit Court decisions are causing litigants to race to and from Circuits.

3. The decision below concerns an "aging and vexing" question which raises significant and recurring problems which are frustrating the purpose of the National Labor Relations Act.

1. The Decision Below Is in Error and Conflicts with the Decisions of Other Courts of Appeals As to the Proper Interpretation of the Statutory Definition of a "Supervisor," under 29 U.S.C. §152(11).

The Trial Examiner of the Board based his decision on the supervisory issue on the following statement:

> "[W]here the facts concerning supervisory status are in dispute, as they are here, I regard evidence of supervisory power *exercised—or not exercised*—as far more persuasive than self-serving testimony concerning their mere *conferral.*" (*OCAW* v. *NLRB,* 445 F.2d at 243-44). [Emphasis added].

This language was adopted by the Board and approved by the District of Columbia Circuit Court.

The Employer had contended before both the Board and the District of Columbia Circuit that a majority of the Circuits had previously ruled that it was the *existence,* rather than the *exercise,* of authority which was controlling. The Employer accused the Board of following the "minority" rule by finding that existence must be accompanied by exercise in order for supervisory status to be proven.

In its opinion, the District of Columbia Circuit attempted to negate the existence of any such "majority-minority" rule and, in fact, stated emphatically:

> "It is a well settled proposition, *mandated by the statute,* that, once the *existence* of supervisory authority is established, the degree of frequency of its *exercise* is of little consequence." (*OCAW* v. *NLRB, supra* at 244). [Emphasis added].

However, the Circuit then illogically reverses the effect of such statutory "mandate" by holding:

> "[T]he nearly total lack of evidence of [supervisory] authority *actually exercised* negates its *existence.*" (*OCAW* v. *NLRB, supra* at 244). [Emphasis added].

Thus, while the District of Columbia Circuit Court gives lip service to the proposition that "once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence," it, in fact, requires *examples* of the *exercise* of such authority before it will conclude that such authority actually exists!

This brings us to the following clear conflict between the Circuits:

A. Majority Rule

A leading case setting forth the majority rule, *Ohio Power Co.* v. *NLRB,* was decided over 20 years ago by the Sixth Circuit. (176 F.2d 385 (6th Cir. 1949)). In substance, this majority rule holds:

> "It [Section 2(11) of the Act] does not require the *exercise* of the power described for all or any definite part of the employee's time. It is the *existence* of the power which determines the classification." (*Ohio Power Co.* v. *NLRB, supra* at 388). [Emphasis added].

A majority of the Circuits have followed the rule as announced in *Ohio Power Co.* case. The First, Second, Third, Seventh, Eighth and Ninth Circuits have cited with approval the Sixth Circuit majority rule. (*NLRB* v. *Leland-*

Gifford Co., 200 F.2d 620 (1st Cir. 1952); *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169 (2d Cir. 1968; *NLRB* v. *Beaver Meadow Creamery*, 215 F.2d 247 (3rd Cir. 1954); *West Penn Power Co.* v. *NLRB*, 337 F.2d 993 (3d Cir. 1964); *NLRB* v. *Elliott-Williams Co.*, 345 F.2d 460 (7th Cir. 1965); *Matthews & Co.* v. *NLRB*, 354 F.2d 432 (8th Cir. 1965); *NLRB* v. *Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960).

To be sure, the Circuits promulgating the majority rule have required the *existence* of the supervisory power to be a real meaningful existence. The Sixth Circuit, for example, has pointed out that:

> "The power must actually exist. Authorization *on paper* for the purpose of excluding an eligible employee from a bargaining unit, *with no intent that the power ever actually be exercised,* is not sufficient." (*Federal Compress & Warehouse Co.* v. *NLRB*, 398 F.2d 631, 634 (6th Cir. 1968)). [Emphasis added].

But true existence of such authority is sufficient whether or not the supervisor has had to exercise the same. (See *NLRB* v. *Leland-Gifford Co., supra*).

B. Conflicting Minority Rule

By contrast, the minority rule would hold that the statute requires both the *existence* and *exercise* of authority in order for an individual to qualify as a supervisor. This rule is exemplified by the District of Columbia Circuit's conclusion in the instant case as follows:

> "[*B*]*eyond the statements or directives themselves* [which had conferred supervisory authority upon the individuals involved long before the union dispute began], what the statute requires is *evidence* of actual supervisory authority *visibly translated* into *tangible examples demonstrating* the existence of such au-

thority." (*OCAW* v. *NLRB, supra* at 243). [Emphasis added].

In addition to the District of Columbia Circuit, this minority rule has found acceptance in varying degrees from the Fourth Circuit, Fifth Circuit, and Seventh Circuit. (*Food Employees Local 347* v. *NLRB,* 422 F.2d 685 (D.C. Cir. 1969); *Brewery Workers* v. *NLRB,* 298 F.2d 297 (D.C. Cir. 1961); *NLRB* v. *Southern Bleachery & Printworkers,* 257 F.2d 235 (4th Cir. 1958); *NLRB* v. *Security Guard Service, Inc.,* 384 F.2d 143 (5th Cir. 1967); *NLRB* v. *American Oil,* 387 F.2d 786 (7th Cir. 1967).

It appears that the conflict between the Circuits has arisen by virtue of an apparent conflict in the use of the term "authority" in the first portion of the definition, as opposed to the term "exercise of such authority" in the last portion of the statutory definition. The minority rule as most recently defined by the District of Columbia decision in the instant case places upon the employer the double burden of showing, first, that authority has been conferred and, second, that there are tangible examples evidencing that the authority has been actually exercised.

When, as in the instant case, the District of Columbia Circuit finds that there is "nearly a total lack of evidence of such authority having been actually *exercised,*" it then finds that the Employer has failed to meet his "double burden of proof" and strikes down the individuals' supervisory status!

By contrast, the majority rule has made it clear that conferral of authority is sufficient if there are no facts in evidence which destroy such conferral by showing it to be a mere sham. The burden is upon the party *denying* such supervisory authority to come forward with evidence which negates its true existence. In the absence of such

evidence, the conferral of power is sufficient. The First Circuit enunciated clearly the method in which the majority rule is applied when it stated, after citing the majority rule:

> "We do not take this statement to mean that mere existence in theory only of a power described in the statute is enough to make a 'supervisor.' Certainly it cannot be said that an employer can make a 'supervisor' out of a rank and file employee simply by giving such an individual a title and theoretical power to perform some one or more of the supervisory functions listed in §2(11). . . . On the other hand, we think the statute does mean that once an individual has actually been clothed with genuine power to perform a supervisory function, he thereupon becomes a 'supervisor,' *even before an opportunity arises to exercise his power, and even though he may not often find it necessary to exert the power conferred.* That is to say, one clothed with real power to discipline other employees, for instance, would be *ipso facto* a 'supervisor,' even though in a particular instance months, or perhaps in rare cases even years, might pass before any occasion ever arose calling for an exercise of the power." (*NLRB* v. *Leland-Gifford Co.*, 200 F.2d at 625).

In the instant case, the Union organizing effort took place "shortly after the employer took over the operation of [the] . . . newly constructed helium plant." (*OCAW* v. *NLRB*, 445 F.2d at 239). The evidence showed conferral of authority, together with a broad differential in pay between the supervisory senior operators and their subordinates, as well as some use of such supervisory authority even during the short period the plant had been in operation. There was no evidence of any kind that the

supervisory authority was other than the result of a good faith conferral by the Employer.[5]

In effect, the District of Columbia's opinion simply finds that if the Employer cannot prove *both* the *existence* and tangible *examples* showing *exercise* of such authority, then the supervisory status fails. This is in direct conflict with the majority rule—and the law.

2. The Conflicting Circuit Court Decisions Are Causing Litigants to Race to and from Circuits.

The Tenth Circuit, when ruling upon the appeal from the 10(j) injunction issued by the District Court for the District of Kansas, refused to define senior operators as "employees." (*Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967)). With this preliminary finding, it is not surprising that the Union picked up phase 2 of the litigation and raced from the Tenth Circuit to the District of Columbia Circuit where a review of the cases would show that this latter Circuit had adopted a minority rule concerning this supervisory question which would be favorable to the Union's contentions. Immediately thereafter, the Employer filed its appeal in the Tenth Circuit, but the District of

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5. In fact, the District of Columbia Circuit admits:

"Ordinarily we would find such internal memoranda and notices to be of substantial probative worth when, as here, they were prepared and circulated prior to the time that any campaign had been undertaken within the company to designate the union as the employees' bargaining representative. In such an atmosphere, untainted by live controversies over the statutory status of any particular group of employees, management's statements conferring responsibilities and allocating duties are likely to be more reliable than similar statements made in the context of union conflict when directives are often addressed as much to the Board as they are to the company's personnel." (*OCAW* v. *NLRB*, 445 F.2d at 243).

Columbia Circuit refused to relinquish jurisdiction, relying on the prior filing in that Court by the Union.[6]

Because of the differing interpretations of the statute by various Circuits and the increasing tendency for litigants to race to the Circuit most favorable to them on a particular issue, the Supreme Court needs to settle this problem.

3. The Decision Below Concerns an "Aging and Vexing" Question Which Raises Significant and Recurring Problems Which Are Frustrating the Purpose of the National Labor Relations Act.

The District of Columbia's decision contained extended discussion covering the "aging but nevertheless persistently vexing problem of whether or not an employee[7] is a supervisor." (*OCAW* v. *NLRB*, 445 F.2d at 240-44). This is probably one of the most disputed and litigated questions in labor law today. Factual situations present a myriad of disputes upon which the Board must rule, but such disputes are greatly multiplied by the increasing diversity among the various Circuits as to the interpretation of the law itself.

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6. Appeals from National Labor Relations Board decisions are somewhat unique in that they may be heard not only by the Circuit Court wherein the dispute occurred, but also in the Circuit Court of Appeals for the District of Columbia and any other Circuit where the litigant is doing business. (29 U.S.C. §160(f)). This encourages litigants to seek "favorable" Circuits.

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7. 29 U.S.C. 152(3) (1964) defines the term "employee" as follows:

> "The term 'employee' shall include any employee . . . but shall not include . . . any *individual* employed as a supervisor . . ." [Emphasis added].

Ironically, the Circuit Court itself did not use the term "*employee*" in its correct statutory sense when pondering the problem of correctly interpreting the statutory definition of a "*supervisor*."

The District of Columbia Circuit Court emphasized the far-reaching and critical nature of this controversy, as it stated:

> "[I]t is *critical*, both in ascertaining the appropriate bargaining unit and in evaluating allegations of unfair labor practices, to determine whether particular individuals are 'employees' or 'supervisors.' *Quite understandably, this statutory dichotomy has spawned substantial Board and appellate litigation.*" (*CCAW* v. *NLRB, supra* at 240). [Emphasis added].

Not only has this "statutory dichotomy" resulted in substantial Board and appellate litigation, but it has also caused increasing frustration among employers, supervisors, and employees who are called upon to define for themselves which persons are supervisors during any union organizational campaign prior to the time the National Labor Relations Board renders its decision. Obviously, an employer *cannot* instruct *employees* to refrain from being involved in such union campaigns, but it *must* order *supervisors* to refrain from such activity. It is of utmost importance, therefore, that employers be able to determine with reasonable certainty which of their personnel are employees legitimately entitled to engage in union activity, as opposed to those who are supervisors whose actions and statements must be controlled by the employer.

In addition, it is "unmistakably clear," as the Circuit Court points out in Note 4 of its opinion, that supervisors are not included within the protections afforded employees by the Act. (*OCAW* v. *NLRB, supra* at 240). Employers are entitled to oppose union efforts within the bounds of the law and to require their supervisors to adhere to this position. Prior to 1947, the National Labor Relations Board had ruled that supervisors were subject to union organization. Hearings on the Taft-Hartley Amendment made it

clear that employers were entitled to loyal supervision not subject to the influence or control of unions. (House Report, 80th Congress, First Session, pages 13-17). As a result, the Taft-Hartley Amendment removed supervisors from the protection of the Act and cast their lot with the management of the company.

The instant case is a prime example of the problems that can and do occur when disloyal senior operators (who were the only supervisors at the plant and in control of the employees for 16 hours of each day, Monday through Friday, and 24 hours on Saturday and Sunday) turn upon the Company and lead employees under their influence and control into union organization. Employers must be able to determine which of their personnel are supervisors to carry out not only employer responsibilities, but also employer rights under the law. This ability is presently in jeopardy due to the conflicting decisions among the various Circuits concerning the statutory definition of the term "supervisor."[8]

Employees are also entitled to know which individuals are supervisors. Obviously, employees are quite likely to sign union cards when a person they understand to be their supervisor (especially one who has been officially cloaked with this authority by repeated statements and written directives of the Company, as in the instant case) "suggests" to such employees that they do so.

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8. The "vexatiousness" of the problem is underscored in the instant case by the fact that the Regional Director himself wandered and was inconsistent in his decision. *Prior* to the discharge, the Regional Director found the senior operators to be supervisors. However, immediately *after* their discharge occurred, he reversed his position and prosecuted the Company for such discharges. It is apparent that the Employer was not safe in the instant case in making such discharges even when relying on the original opinion of the Regional Director.

In view of these facts, it is of utmost importance that the Supreme Court finally review and make a definitive determination as to the actual meaning of the statute defining supervisors. Failure to do so is resulting in increasing uncertainty and unnecessary litigation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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